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IN THE

SUPREME COURT OF THE UNITED STATES.

330 U.S. #13

OCTOBER TERM, 1943. ETT-FED

LESTER ETTMAN,
Petitioner,

vs.

FEDERAL LIFE INSURANCE COMPANY,
Respondent.

No. 426

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

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To the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States of America, and to the Associate Justices:

Petitioner, Lester Ettman, an individual, respectfully shows to this Honorable Court:

I.

STATEMENT OF MATTER INVOLVED.

This is a suit at law against respondent on an accident and health insurance policy written and delivered in Missouri to a Missouri resident to recover total and permanent disability benefits due petitioner thereunder for the total loss of sight of both eyes. Diversity of citizenship gave jurisdiction. Under the trial court's charge, which was practically peremptory, the jury returned a verdict for defendant (R. 276). The Circuit Court of Appeals for the Eighth Circuit affirmed (R. 308). The policy provided a disability benefit of $300.00 per month **for life** in the event of the loss of sight of both eyes as a result of accidental injury or sickness (R. 20). At the time suit was filed, the unpaid disability benefits due petitioner totaled $16,200.00, together with interest. Petitioner's application for insurance is dated January 3, 1928; his policy is dated January 17, 1928 (R. 20).

Part 7, paragraph 2, of the policy provides:

> "No statement made by the applicant for insurance, not included herein, shall void the policy or be used in any legal proceeding hereunder."

Part 9, paragraph 8, of the policy provides:

> "The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed thereunder, or made with intent to deceive, shall bar all right to recovery under this policy" (R. 15).

Petitioner lost the sight of both eyes prior to January, 1936 (R. 43-44). In 1940, after paying twelve yearly premiums, petitioner discovered, through an insurance agent, that he was entitled to the policy total disability benefits because of said loss of the sight of both eyes and made

claim therefor (R. 239). The Company refused payment and tendered the premiums paid thereon, less $66.55, the refunded premium reduction under the policy coupon plan (R. 20). The Company then (prior to the institution of this instant suit) brought an equity suit in the federal court, to cancel said policy, claiming fraud and misrepresentation made with intent to deceive (R. 50-51); claiming that in the application the petitioner was asked, among some sixty-four subquestions, under question 4, the following: "Have you now or have you ever had any of the following complaints, symptoms or diseases * * * Difficulty with eyesight or hearing? No" (R. 77). The Company also contended that the petitioner was suffering from retinitis pigmentosa, a disease of the eyes, which he intentionally withheld from the Company at the time of the application, and that he had also knowingly withheld information concerning medical attention (R. 11-16). [The trial court in the instant case found that the Company doctor had testified that the word "No" was probably a mistake, as petitioner had informed him of being nearsighted and was wearing glasses (R. 292).] The Company contended that this answer was untrue and knowingly made with intent to deceive. A motion to dismiss said suit was sustained by the trial court, affirmed by the Circuit Court of Appeals for the Eighth Circuit on the ground that after the occurrence of the contingency the defense of fraud and misrepresentation could be asserted at law (R. 54) (120 F. [2d] 837) and this Court denied certiorari (314 U. S. 660). The answer in the present case (R. 10 to 17, inclusive) pleads exactly what was pleaded in said original equity suit to cancel said policy.

Both in the original suit to cancel the policy, and in the defense of the instant suit, the Company relied on "a theory of fraud and misrepresentation made with intent to deceive." We assume that this Court will judicially notice its

own records. The Company's said petition for certiorari filed in the original equity proceeding (this court's cause No. 560, October Term, 1941) sets out the following questions:

> "1. Is an insurance company entitled to invoke the equitable jurisdiction of a United States District Court to cancel or rescind a policy of insurance issued by it in response **to false and fraudulent representations and statements made by the assured, when such false and fraudulent representations are material to the risk insured against?**
>
> "2. Does the opportunity of an insurance company to contest an action at law to recover under a policy of disability insurance, on the ground that the policy was procured **through fraud and misrepresentation** material to the disability claimed deprive the insurance company of its right to maintain a bill in equity to cancel the policy?
>
> "3. Where an insurance company defends against a suit at law to collect disability benefits under an insurance policy on the ground that the policy was **obtained through fraud and misrepresentation, material to the disability claimed, will a judgment establishing fraud** in the procurement of the policy bar any and all subsequent claims for indemnity under the policy, without a showing that the **fraud practiced in the procurement of the policy is material to the contingency upon which said subsequent claim is based?"** (Emphasis ours.)

In the summary of the argument in said petition for certiorari, the Company contended:

> "Under the law of Missouri, fraud and misrepresentation in the procurement of an insurance policy is not a defense to an action to recover under the policy for any disability insured against, unless the fraud and misrepresentation is material to the disability claimed by the policyholder";

and also:

> "petitioner would have to establish not only that respondent procured the policy through fraud and misrepresentation, but that the particular fraud and misrepresentation practiced by him contributed to the loss of his eyesight, because both the federal courts and courts of Missouri have consistently held that an insurance company will not be relieved from paying indemnity under a policy issued by it on the ground that the policy was procured through fraud, unless the fraud was material to the risk insured against, and actually contributed to bring about the contingency or circumstance upon which a claim of liability is based."

The trial court in the instant case took the view that there was "a warranty made by petitioner," and refused instructions offered by both sides based on the issue of "fraud and misrepresentations" (R. 250, 264, 266). The Company defended the suit on the theory that assured had a disease known as retinitis pigmentosa and that said fact was **knowingly concealed.** There was **no evidence** that assured knew that he had said disease. On the contrary, said fact was kept from him by his oculist, Dr. Meyer Wiener, an eminent and very reputable physician. The Court of Appeals held (R. 311) **the verdict was not a determination that the assured knew that he had any eye disease when he applied for the policy or that he was guilty of fraud in making the answers which he made.**

The trial court, in effect, gave a peremptory instruction to find for defendant if the assured **had** said disease, even though he did **not know it,** and specifically instructed the jury that knowledge on his part was immaterial; that if assured **had** said disease there was a breach of "**warranty**" and the assured could not recover (R. 250).

The Court of Appeals based its opinion, herein complained of, on the assumption that the statement was un-

true and material but made **without intent** to deceive and that the insured certified to the truth of the statements made in the application (R. 308).

At the trial (R. 264-5, 269, 292) the trial court and both sides assumed that Section 5843, R. S. Mo. 1939, known as the Misrepresentation Statute, which was also in force at the time of the application, was applicable and governed. It provides:

> "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the **contingency or event** on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." (Emphasis ours.)

The Court of Appeals, however, stating that the trial court and counsel for both sides had committed a plain error of law in assuming the Misrepresentation Statute applicable (R. 319), held that the above statute had no application (R. 319) in the instant case (in spite of several Missouri cases holding to the contrary), because the Court of Appeals said, there was no "**death benefit**" provided for in the policy in the case at bar; that it would therefore not follow these decisions, in spite of the fact that the only issue involved in the said cases decided by the Missouri courts, was the issue of disability benefits and not death benefits. In so holding, the Court of Appeals said:

> "It is possible that the courts of Missouri may, by construction expand this statute to cover every kind of policy written by a company authorized to write insurance on life, * * * but as yet they have apparently not done so. In the absence of compelling authority, this Court will not rule, intimate or agree that the statute applies to the policy in suit" (R. 320).

The Court of Appeals thereupon held that the common law applied, and that assured's statements in the application were **warranties**; and the question whether said statements were innocently or fraudulently made was not a material issue. Said Court of Appeals also ruled (R. 321) that it is of no consequence that the company **in its pleadings and at the trial**, had assumed that it must prove **insured's intent to deceive the company.**

In the Court of Appeals, petitioner contended: (a) That the Company did not plead or rely on any **warranty** and called attention to the Company's instructions and exceptions to the Court's charge to support said contention (R. pp. 268-271); (b) that there was no warranty; (c) that the Company examined petitioner, knew as much about his condition as petitioner, and is estopped to deny his insurability, the company doctor having examined petitioner's eyes with a light (R. 211), having noticed that petitioner wore thick, heavy glasses, and having testified that he had a chart in the office for examining eyes, but did not use the same on petitioner (R. 164); (d) that the Company waived any additional examination and waived any physical defect, and was put on notice. These points were all supported by Missouri authorities (R. 323-329).

The Court of Appeals refused to pass on any point other than the issue of **warranty**, saying (R. 321): "The other contentions of the insured have been examined, but do not require discussion."

The testimony showed that the petitioner was very active, he bowled, went to ball games, picture shows, played cards, traveled alone on the road, even traveling at night, carried his own luggage, carried on business, and in general did the same things that an ordinary normal person would do, and could see well enough to write until about 1935, some seven years after he had taken out the policy. The Company does not dispute that petitioner did these things (R. 240). After 1929, petitioner acted as manager

for his uncle, who was in the sponge business, when the latter became feeble. Even petitioner's friends did not notice there was anything wrong with his eyes until 1935 (R. 32, 38). After 1935 he could not see to write checks, he could merely sign them (R. 44). Dr. Meyer Wiener, an outstanding oculist, testified that patients come to see him with just a central vision left, without realizing that they are in a serious condition. They would not know that they could not see except straight ahead, until their fields were taken, and it was explained to them (R. 202). The patient would not know what is normal and what is abnormal. He did not tell Ettman of his condition (R. 206). Nor is there any evidence in the record to show that Ettman knew that he had retinitis pigmentosa.

The Company offered the testimony of several oculists to prove that petitioner had retinitis pigmentosa, but none of these testified that they ever told him. In 1918 he was sent to Barnes Hospital by Dr. Wiener for an examination. He received no treatment; his tests were negative (R. p. 83). He wore approximately the same glasses in 1928 that he wore in 1923.

The application for the insurance in question was made out in the handwriting of an insurance agent who obtained the information for said application from other policies that he had written for the petitioner, and he did not ask petitioner any question (R. 231). The Company's medical examiner, Dr. John Salter, produced his records of his examination, on which he had noted that the assured had **moderate myopia** (R. 152). He had examined the petitioner about two weeks previously on a $2,000.00 life insurance policy with the Northwestern Mutual Life Insurance Company, and in that application had marked "moderate myopia" (R. 155). A photostatic copy of said doctor's records appears in the record at page 152. After the words "ear, eye, etc.," on said record, appears the word "**yes**" in said doctor's handwriting, indicating that

he found something wrong with the applicant's eyes. Under the heading of "Remarks" on said record said doctor had written thereon the words "moderate myopia." He conveyed this information to the Company, although he did not write it in the said application (R. 163). On the said record of the doctor (R. 152), near the top of the page, on the right-hand side, appear the words "severe myopia corrected." There was a question as to when Dr. Salter wrote that. His testimony at the trial was inconsistent with his deposition previously taken as to when "severe myopia corrected" was written (R. 164).

Dr. John Green, an oculist, produced by the Company (R. 113), testified that as soon as myopia is mentioned, it brings to his mind the possibility of changes taking place later, including detachment of the retina (R. 104).

Several types of myopia are defined in the American Illustrated Medical Dictionary, such as malignant, axial, chronic, curvature and index. Malignant myopia is defined as a progressive myopia associated with the grave disease of the choroid, and leading to retinal detachment and blindness.

In the motion for rehearing, the attention of the Court of Appeals was called to the fact that it had failed to follow the Missouri law in connection with the aforesaid misrepresentation statute, failed to follow the Missouri law governing the issues of waiver, and that the Court had decided the case on a theory not relied on by either party or the court below (R. 321).

II.

QUESTIONS PRESENTED.

The principal questions presented are:

(1) Can a United States Circuit Court of Appeals in deciding a case "by-pass" a positive rule of state law decisive of the case in question, and thereby avoid the

effect of the rule laid down in Erie v. Tompkins (304 U. S. 64, 82 L. Ed. 1188) and other cases decided by this Court, by ignoring the issues squarely raised by the pleadings, instructions and briefs, by simply saying in the opinion, "The other contentions of the insured have been examined but do not require discussion" (R. 321).

(2) Can the Court of Appeals refuse to follow the construction of the Missouri Misrepresentation Statute, Section 5443, R. S. Mo. 1939, as applied to accident and health policies by the bench and bar of Missouri, including the trial judge and including counsel for both parties in the instant case, particularly where the Missouri courts have held the statute applies to both misrepresentations and **warranties?** [Cases cited under (2) Reasons for Granting the Writ.)

(3) Is the failure of an insurance company to plead and rely upon the defense of "**warranty**" a matter of substantive law or adjective law, where the state court has held that such constitutes a waiver? The state court has held that merely pleading the provisions of a policy in haec verba is not pleading a warranty (Brummer v. Ins. Co., 59 S. W. [2nd] 781; Wolfe v. Sup. Lodge, 160 Mo. 675, 61 S. W. 637).

(4) Can a Federal Court of Appeals decide a case on a theory upon which the case was **not** tried below?

(5) Where a construction has been placed upon a state statute by the appellate courts of that state, and generally accepted by the bench and bar, and there is no law holding to the contrary, has a federal court sitting in that state the right to carve out an exception and to require "compelling authority" or must the federal court show by what authority it refuses to follow the state rule and policy?

(6) Where a defendant has waived a defense under subdivision (h) of Rule 12 of the Federal Rules of Procedure, as shown by its pleadings, and by its requested instructions, can a federal court allow the defendant to assert such a defense by the Court's construction of the pleadings where under the state law the defense has been waived?

III.

REASONS FOR GRANTING THE WRIT.

1.

The question this Court is called upon to decide is of great importance. The effect of the rule in Erie v. Tompkins can be destroyed or greatly impaired if federal courts can refuse to pass upon an issue decisive of a case, and simply "by-pass" it. The Missouri courts have held in several cases that where an insurance company receives enough information to put it on notice, it waives any additional information if it does not request the same or does not request any further examination.

> Brummer v. Natl. Life Ins. Co., 59 S. W. (2d) 781;
> Loduca v. Ins. Co., 105 S. W. (2d) 1011;
> State ex rel. v. Allen, 303 Mo. 608, 262 S. W. 43.

The Court of Appeals for the Eighth Circuit itself has so held.

> Phoenix Mut. Life Ins. Co. v. Harmegnies, 110 F. (2d) 20.

2.

The Court of Appeals has decided the case at bar in the very teeth of the rulings made by this Court in **West v. American Tel. & Tel. Co.**, 311 U. S. 223; in **Six Companies of Cal. et al. v. Joint Highway District et al.**, 311 U. S. 180, 61 S. Ct. 186; **Stoner v. N. Y. Life Ins. Co.**, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284, and **Fidelity Union Trust**

Company v. Field, 311 U. S. 169, where **this** Court held, that it is the duty of the federal courts to ascertain from all the available data what the state law is and apply it, irrespective of whether the Court of Appeals thinks that the Supreme Court of the state will at some later date modify the rule.

The Court of Appeals itself quotes from the law as announced by the Supreme Court of Missouri in **Lamport v. General Accident, Fire & Life Assur. Corp.,** 197 S. W. 95, l. c. 100, 272 Mo. 19 (R. 320), where that Court, referring to an accident policy, says:

> "* * * It has been held that a policy of this character, at least with reference to those portions providing indemnity for loss of life, **were** policies of life insurance, * * *. By like reasoning, such a policy, or at least so much thereof as relates to indemnity for loss of life, would likewise be a 'policy of insurance on life,' * * *."

In **Makos v. Ins. Co.,** 234 S. W., the Kansas City Court of appeals, construing this same statute, held:

> "It is claimed that Section 6142, R. S. 1919, concerning materiality of misrepresentation in procuring insurance, does not apply to policies of this kind. We think there is no merit in this contention."

In **Boillot v. Guar. Co.,** 83 S. W. (2d) 219, l. c. 223, the St. Louis Court of Appeals held:

> "The provisions of this section are applicable to accident policies such as is here in suit as well as to ordinary life policies" (citing cases).

In the above cases decided in Missouri by the appellate courts on the question of whether the Misrepresentation statute applies to accident and health insurance, the issues involved only accident or health indemnities. The

policies happened to contain provisions for indemnity in case of loss of life; in none of them, however, was suit brought for death indemnity. In no case in Missouri is there a holding that the misrepresentation statute does **not** apply to an accident and health policy where there was no death indemnity benefit. Has the Court of Appeals, therefore, a right to construe the statute contrary to the universally accepted construction placed upon the statute by the bench and bar of Missouri, including the trial judge and both counsel for the parties in the case at bar? The same statute, word for word, is the Kansas Statute, G. L. 1935, 40-418. While not controlling here, it is of interest and persuasive to note that the Supreme Court of Kansas held in Elliff v. Interstate Bus. Men's Acc. Co., 109 Pac. (2nd) 92, l. c. 95, 153 Kans. 177, that "the statute applies to health and accident policies" (1941).

3.

If federal courts can require "compelling authority" before they will follow rules of substantive law as declared by the state courts, as accepted and construed by the Bar, then the effect of the doctrine laid down in Erie v. Tompkins (supra) can be largely emasculated.

4.

There arises an important question regarding the construction of rule 12 of Federal Procedure, subdivision (h), relating to waiver. Under the Missouri law, where an insurance company relies on certain defenses, and so states either by letter or in its pleadings, it waives all other defenses (cases cited under Point 4, Argument). If federal courts can place a different construction upon such conduct of insurance companies, different from the Missouri law, then they are failing to follow the substantive law of the state.

5.

Where a United States Circuit Court of Appeals decides a case on a theory on which it was not tried below and not relied on by either of the parties or the trial judge, this Court has held, that the losing party has not had his day in court. Cases must be decided on appeal on the same theory presented below.

West Ohio Gas Co. v. Pub. Utilities Com., 294 U. S. 63, 55 S. Ct. 316;
San Juan Light Co. v. Requena, 224 U. S. 89, l. c. 96-97, 32 S. Ct. 399, 56 L. Ed. 680;
Thomas v. Taylor, 224 U. S. 73, 32 S. Ct. 403;
4 C. J. S., p. 465, par. 241.

6.

If there is only a warranty involved (we are firmly convinced the Court of Appeals is in error) then the opinion of the Circuit Court of Appeals is in conflict with an opinion of the Third Circuit in the case of **Ward v. Standard Accident Ins. Co.**, 30 F. (2d) 328, where the phraseology of the policy was almost identical with that in the case at bar, except that one of the phrases in the application is transposed and the Court of Appeals for the Third Circuit limited the defense to false representations and held there was no warranty.

7.

The opinion is untenable and is in conflict with the overwhelming weight of authority.

Home Life Ins. Co. etc. v. Fisher, 188 U. S. 726, 23 S. Ct. 380, 47 L. Ed. 667;
Kettenbach v. Omaha Life Ass'n, 69 N. W. 135;
Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 252;
Jenkins v. Co., 171 Mo. 375, 71 S. W. 688;
Glaser v. Ins. Co., 245 Mo. 377, 150 S. W. 549;

Schuerman v. Ins. Co., 165 Mo. 641, 65 S. W. 723;
Cooley, Vol 5, p. 4115;
2 Couch on Ins., p. 1464;
Ward v. Ins. Co., 30 F. (2nd) 328 (C. C. A. 3).

8.

The question is of great public importance. There are many thousands of health and accident policies outstanding in the State of Missouri and in other states having a "Misrepresentation Statute." The question is one of great importance both to the public and to the insurance companies.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Judicial Circuit, commanding that Court to certify and to send to this Court a full and complete transcript of the record and all proceedings in the case numbered 12,559, entitled on its docket Lester Ettman, appellant, v. Federal Life Insurance Company, appellee, at law, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; that the said judgment of said Circuit Court of Appeals for the Eighth Judicial Circuit may be reversed by this Honorable Court, and for such other and further relief as to this Honorable Court may seem meet and just.

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BRIEF

In Support of Petition for Writ of Certiorari.

I.

OPINION.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit was handed down July 30, 1943. It is reported Vol. 137 F. (2nd) 121. The motion for rehearing was filed **August 12, 1943**, and was overruled August 30, 1943.

II.

JURISDICTION.

(1) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, amended February 13, 1925, Chap. 229, 43 Stat. 938, Sec. 1217, U. S. Compiled Accumulative Supp. 1925, 28 U. S. C. A. 347.

(2) The date of the judgment to be reviewed is July 30, 1943 (R. 308). The motion for rehearing was overruled August 30, 1943 (R. 331).

(3) The facts showing jurisdiction have heretofore been set out in the petition under the heading, "Statement of Matter Involved," and under the "Questions Presented."

(4) The following cases sustain the jurisdiction of this Court to review the decision of the Court of Appeals on the questions involved for the reasons set out in the specifications of error:

Erie v. Tompkins, 204 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188;

West v. Amer. Tel. & Tel. Co., 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 185;

Six Cos. of Cal. et al. v. District et al., 311 U. S. 180, 61 Sup. Ct. 186, 85 L. Ed. 159;
Fidelity Union Trust Co. v. Field, 311 U. S. 169, 61 Sup. Ct. 176, 85 L. Ed. 109;
Stoner v. N. Y. Life Ins. Co., 311 U. S. 464, 61 Sup. Ct. 336, 85 L. Ed. 284;
West Ohio Gas Co. v. Pub. Utilities Com., 294 U. S. 63, 55 S. Ct. 316;
San Juan Light Co. v. Requena, 224 U. S. 89, l. c. 96-97;
Thomas v. Taylor, 224 U. S. 73, 32 S. Ct. 403;
Home Life Ins. Co. v. Fisher, 188 U. S. 726, 23 S. Ct. 380, 47 L. Ed. 667.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition for certiorari under point I, under the heading, "Statement of Matter Involved," which in the interest of brevity is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

(1) In ignoring and "by passing" the state rule of law covering "waiver" where an insurance company examines an applicant and is put on notice with respect to his condition.

(2) In holding that the Missouri misrepresentation statute, Section 5843, R. S. 1939, did not apply to health and accident policies, contrary to the general acceptance of the Missouri bench and bar.

(3) In holding that under the Missouri law there was a warranty.

(4) In failing and refusing to follow the Missouri substantive rule of law that an insurance company waives all defenses not pleaded and relied on.

(5) In deciding the case on a theory on which it was not tried below.

(6) In failing and refusing to reverse the judgment with instruction to enter a judgment for the plaintiff below.

V.

SUMMARY OF THE ARGUMENT.

Waiver Where Company Placed on Notice.

(1) In Missouri, where an insurance company receives sufficient information of an applicant's condition to put it on notice, if it fails to ask for any further examination, it waives the same and is estopped to deny the insurability of the insured.

Misrepresentation Statute Applicable.

(2) The Missouri misrepresentation statute, Sec. 5843, R. S. Mo. 1939, applies to health and accident policies. Missouri and Kansas both have the identically same misrepresentation statute; both states have held that it applies to health and accident policies.

No Warranty Under Missouri Law.

(3) There was no warranty under the Missouri law. The trial court (R. 286) found that the contract "belongs to a species which fortunately is rapidly becoming extinct." Calling a statement a warranty does not make it so. Under the Missouri law there must be an intent to deceive. The Court of Appeals based its opinion upon statements made without intent to deceive (R. 308).

Refusal to Pay on One Ground Waives Others.

(4) Where an insurance company refuses payment on certain grounds under the Missouri law, **it waives all other grounds.** It matters not whether its position is taken by letter or by pleadings or by instructions to a jury. Having relied upon the issues of fraud and fraudulent misrepresentations and having failed to prove the same, its defense failed as a matter of law.

No New Theory on Appeal.

(5) The rule is well settled that a case must be decided on appeal on the same theory on which it was tried. The parties and the court below all tried the case in accordance with the universally accepted rule that the misrepresentation statute applies to health and accident policies in Missouri. The Court of Appeals had no right to decide it on some other theory inconsistent with the theory on **which the case was tried and contrary to Missouri law and Missouri policy.**

Petitioner Entitled to Directed Verdict.

(6) Since the defense invoked was fraud and fraudulent misrepresentation with intent to deceive and since it failed, the trial judge should have directed a verdict for the plaintiff below, and the petitioner having urged the point on appeal, the Court of Appeals should have remanded the case with directions to enter a judgment for petitioner (plaintiff below).

ARGUMENT.

1.

Waiver Where Company Placed On Notice.

In Missouri the law is well settled that where an insurance company receives information regarding an applicant's condition, which is sufficient to put it on notice, it waives any further examination, if it does not request any further examination, and is estopped to deny the insurability of the applicant. As to what constitutes such notice, it was held in **Brummer v. Insurance Co.**, 59 S. W. (2d) 781, l. c. 786, that where an applicant had an abscess which necessitated the removal of a part of a rib and the insertion of a drainage tube and was in the hospital for a period of time, although she had denied that she had any lung trouble, this was sufficient to put the insurance company on notice, or at least to put the examiner on inquiry as to the condition of her lungs.

In the case of **Loduca v. Ins. Co.**, 105 S. W. (2d) 1011, the St. Louis Court of Appeals specifically points out that it is not necessary for the insurance company to actually know the condition; it is sufficient if it is put on notice. The test laid down by the Court is that it will, as a general rule, suffice that the insurer had information which, if pursued with reasonable diligence, would have led to the discovery of the breach (citing a number of Missouri cases [l. c. 1013], and also citing Supreme Lodge v. Kalinski, 163 U. S. 289, l. c. 298, 16 S. Ct. 1047, 41 L. Ed. 163).

To the same effect is the rule of law laid down in **State ex rel. v. Allen**, 303 Mo. 608, 262 S. W. 43.

2.

Misrepresentation Statute Applicable.

This Court has recently held in several cases, beginning with the Erie Case, supra, that the federal courts are bound to follow the state law construing state statutes

(cases cited under Point 2, Reasons for Granting the Writ). The Court of Appeals, in its opinion (R. 320), quotes from the case of **Lamport v. General Accident etc. Corp.**, p. 100 of 197 S. W., with respect to an accident policy, which we have set out in the petition for certiorari, and, in the interest of brevity, do not repeat here. The Lamport case, which was decided by the Supreme Court of Missouri, shows on its face that that Court holds "that such a policy" would likewise be a policy of insurance on life within the scope of the Misrepresentation Statute. The fact that the Supreme Court adds, "or at least so much thereof as relates to indemnity for loss of life," does not alter the fact that the Court also holds that a health and accident policy is within the purview of the statute.

The attention of the Court of Appeals on motion for rehearing was called to the Missouri decisions (R. 325), and was also called to the law, as pronounced by this Court, that where there is a pronouncement of the state law by a state appellate court, which ruling apparently has not been disproved and there is no evidence that the law of the state is otherwise, it is the duty of the federal courts to follow the state rule. **West v. Tel. & Tel. Co.**, 311 U. S. 223. **Six Companies of California et al. v. Joint Highway District et al.**, 311 U. S. (2d) 180, and other cases cited under point 2, Reasons for Granting the Writ. This is particularly true where the same has been so construed by the Bench and Bar. What better evidence can there be than the decisions we have cited and the fact that the trial court and counsel for both parties assumed that the Misrepresentation Statute applied at all time, not only in the trial court, but even in the Court of Appeals and in this Court when the company applied for a writ of certiorari, as set out supra. Note the language of the statute, "unless the matter misrepresented shall have actually contributed to the **contingency or event.**" The statute does not mention **death.** The chapter under consideration,

Chapter 37, Article II, R. S. Mo. 1939, which was also in force at the time of the application in question, deals with "Life and Accident Companies."

Furthermore, statutes of this kind are liberally construed. The Legislature had in mind personal insurance as opposed to property insurance. In a sense the insurance in question was insurance on Ettman's life. It was to pay him disability benefits during **his life** and, therefore, was insurance on his life within the meaning of the statute as held by the Supreme Court of Missouri in the Lamport case, supra, and the Makos and Boillot cases, supra.

The Supreme Court of Kansas in passing upon the Kansas statute, G. L. 1935, 40-418, which is word for word like the Missouri statute, held "The statute applies to health and accident policies." **Elliff v. Interstate Bus. Men's Assn. Co.**, 153 Kans. 177, 109 Pac. (2d) 92, l. c. 95.

While the Kansas Law is not controlling here, it indicates that the Kansas policy is similar to that of Missouri; both states have construed the statute to apply to health and accident policies.

3.

No Warranty Under the Missouri Law. Bad Faith Essential Element.

The trial court found that the contract in question "belongs to a species which fortunately is rapidly becoming extinct." Calling a statement a warranty does not make it so. Under the Missouri law there must be an intent to deceive. The Court of Appeals in its opinion found that there was no fraud since there was no knowledge on the part of the applicant (R. 308). In the case of Ins. Co. v. Glaser, 245 Mo. 377, 150 S. W. 549, cited by the Court of Appeals in the Court's opinion (R. 318), the Supreme Court of Missouri expressly holds that (l. c. 389, 245 Mo.) "as a basis for such relief on the ground

of fraud, the mere falsity of the statements and breach of warranties are not alone sufficient. It is essentiai that the applicant **had knowledge of their falsity** and acted **in bad faith,** to warrant that remedy," citing Schuerman v. Ins. Co., 165 Mo. 641; Kern v. Legion of Honor, 167 Mo. 471; Keller v. Ins. Co., 198 Mo. 440. The Court of Appeals has confused the **judgment** of the Missouri Supreme Court with its **pronouncement** of the Missouri law. In the Glaser case there was a rescission before the occurrence of the contingency, on the ground of **mistake not fraud.** Where the remedy is sought on the ground of fraud even in connection with warranties bad faith is essential. l. c. 389, Glaser case, supra.

The Schuerman case, supra, is the leading case in Missouri in holding that an insurance company is not entitled to equitable relief after the occurrence of the contingency calling for performance under the policy. The reason for the enactment of the misrepresentation statute is discussed by the Court (l. c. 653) and the evil of inserting **warranties** in policies and avoiding their obligations by insurance companies is discussed. Certainly everything discussed by the Court there is applicable to health and accident policies as well as straight life insurance policies.

In Kern v. Legion of Honor, 167 Mo. 471, 67 S. W. 252, the Missouri Supreme Court discusses the statute in question (l. c. 487) and the evil that had grown up of making statements and answers warranties in policies. The Court says that the real meaning of the statute is (l. c. 489) "to hold that no misrepresentation, whether innocent or fraudulent, when based upon a warranty of truth by the terms of the policy or not, shall be a defense 'unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.' "

The statute is also held to apply alike to warranties and misrepresentations in Jacobs v. Life Assn., 146 Mo. 523, 48

S. W. 472, and Jenkins v. Ins. Co., 171 Mo. 375, 71 S. W. 688.

Therefore, it follows that under the Missouri law, it is incumbent upon the insurance company to plead and prove that the statements and answers were made as written in the application, that they were false in some particular material to the insurance risk, that the applicant had knowledge of their falsity and acted in bad faith and that the company relied and acted upon such statements and but for such misrepresentations would not have assumed the risk. There was an utter failure to prove these vital elements by the insurance company in the instant case.

The opinion of the Court of Appeals **is in conflict** with the case of **Ward v. Standard Accident Ins. Co.**, 30 F. (2) 328 (C. C. A. 3), where the provision in the application was:

> "I hereby apply for a policy to be based upon the following statement of facts. I understand and agree that the falsity of any statement in this application shall bar the right to recovery if such false statement is made with the intent to deceive or materially affects with the acceptance of the risk or the hazard assumed by the company."

Note that the phraseology is identical with that in the case at bar except that one of the phrases is transposed. The alleged misrepresentations are the answers to two questions. The first question and answer is: "Is your sight or hearing impaired? No, ordinary use of glasses." The applicant was peculiarly susceptible to detachment of the retina upon the slightest injury or strain. She had admitted this to her doctor. She had had trouble with her eyes when a child. The Court stated that the answer of the applicant showed that her sight was not normal; that her vision was impaired, but the Court re-

fused to say that her answer was false or that it was made with intent to deceive or that it materially affected the acceptance of the risk or the hazard assumed (l. c. 329). The second question and answer is: "State what medical or surgical attention you have received within the past five years. None." She had consulted Dr. Dennis, an eye specialist, to have her glasses looked over and had her lenses checked up every two or three years. The Court held that this statement made by her could not be said to be false. A judgment for the plaintiff was affirmed for a fall in the bath tub, injuring her spine and bringing about a detachment of the retina of her eye and the total loss of sight.

In the case of **Kettenbach v. Omaha Life Assn.**, 69 N. W. 135, the application contained even stronger language with reference to warranty. That Court said that the fact that sometimes the word "warranties" was used and sometimes the word "statements," indicated that it was not the intent of the parties that the validity of the policy should depend upon the literal truth of every answer and statement made in the application.

In the case at bar the word "statement" is used in connection with the falsity of any statement (R. 23).

The Nebraska Court pointed out that it might require a post mortem examination to enable medical experts to determine whether any of the organs of applicant had been diseased since childhood. The last two cases are cited to show that the opinion is contrary to the better reasoned cases from other jurisdictions and therefore against the weight of authority. We could cite many other cases. Many of them were cited in the Court of Appeals brief.

4.

Refusal to Pay on One Ground Waives Others.

Where an insurance company refuses payment on certain grounds, under the Missouri law it waives all other grounds.

Lee v. Met. Life Ins. Co., 235 Mo. App. 900, 144 S. W. (2d) 830, 235 Mo. App. 900;
Corcoran v. Met. Life Ins. Co., 93 S. W. (2d) 1027;
Lamphermier v. N. W. Mut. Life Ins. Co., 24 S. W. (2d) 1062;
Ash Grove Service etc. v. Southern Surety Co., 39 S. W. (2d) 434, 441 (waiver in letter);
Goffe v. Surety Co., 321 Mo. 140, 95 S. W. (2d) 929, 938.

In the case at bar, the only defense invoked by the company was one based on fraud and fraudulent misrepresentations made with intent to deceive. Therefore, it waived any other defense, if any it had. This was the only defense pleaded, the only defense invoked in the trial of the case, as shown by the defendant's requested instructions, which were refused by the Court (R. 266, 271). This was the only defense urged in the Court of Appeals; likewise, it was the only ground upon which the insurance company sought to cancel the policy in the trial court, in the Court of Appeals and in this Court on certiorari, as we have shown above. Under the Missouri law, it was wholly insufficient to simply plead the terms of the policy in haec verba as a warranty.

The St. Louis Court of Appeals in the Brummer case, supra, held that because the company had pleaded that it refused to pay the policy "on account of the aforesaid misrepresentations and false and fraudulent warranties," this was insufficient and that it was insufficient to merely quote the provisions of the policy, and they held there was no mere defect in pleading which could be

cured by verdict. In other words, it is a matter of substantive law; it is a waiver under the state law of any other defense than that pleaded, and therefore the Federal Court has no right to construe the pleadings in a way that deprives the plaintiff of a substantive right. Otherwise a litigant would have one brand of law in the state court and another in the Federal Court. If he has certain rights under the state law, he must have those same rights in a Federal Court. It is not merely a rule of pleading, it is a rule of substantive law. The Federal Rules of Procedure also hold that all defenses not pleaded are waived [Rule 12 (h)].

The Court will readily see the importance of this question since it is bound to arise again and again and create a conflict unless it is decided by this Court. It matters not, therefore, whether the legal position of the company is taken by letter, by the pleadings, by the instructions, or by the position in the appellate court. Having taken a position and denied liability on certain grounds, it waives all other grounds under the state law.

The Court of Appeals, therefore, had no authority to disregard the state substantive law and to hold that warranties were within the answer filed by the company, and that it was immaterial that the company "assumed in the pleadings and upon the trial that it must prove an intent on the part of the insured to deceive" (R. 321).

5.

No New Theory on Appeal.

The rule is well settled that a case must be decided on appeal on the same theory on which it was tried. The parties on appeal both assumed that the Misrepresentation Statute applied. The trial court tried the case on that theory, the Court of Appeals decided it on the theory that the Misrepresentation Statute did **not** apply. None of

the cases cited by the Court of Appeals support it. It is true they were cases where there was a death benefit but other than in the Williams case cited by the Court of Appeals (R. 319) the disability benefits grew out of accidents and the assureds were suing to collect disability benefits. We do not believe there is any case in Missouri where the policy is a purely health and accident policy, where the Court has held that the Misrepresentation Statute does not apply. We found none, the Court of Appeals found none. Everything points to the application of the Misrepresentation Statute.

We submit that under the decisions of this Court that the Court of Appeals has no right to disregard the policy of the State of Missouri where that policy has been enunciated by the courts of this state and has been accepted by the Bar, including the trial judge and including the lawyers for both sides, in the instant case. Therefore, as we stated above, in our application for certiorari, the decision of the Court of Appeals contravenes the recent decisions of this Court holding that the federal courts are bound to follow the state rule on matters of substantive law. It was not a plain error of law not raised or argued, as the Court of Appeals states in its opinion (R. 319). On the contrary, it was an error of law committed by the Court of Appeals in refusing to follow the law of the state as announced by the courts, and as accepted by the Bench and Bar of Missouri.

6.

Petitioner Entitled to Directed Verdict.

Since the defense invoked was fraud and fraudulent misrepresentation with intent to deceive, and since it failed, and since it was the only defense pleaded and relied on in any of the courts by the Company, there should have been a directed verdict for the plaintiff in the trial court. This

was requested and refused (R. 262). The trial court found that Dr. Salter had mistakenly written "No" under question 4 in the application. Besides if "No" was true as to any one of several questions included in one, it was not false as to any. Van Wormer v. Ins. Co., 188 Ill. App. 166.

The trial court refused the instructions offered both by plaintiff and defendant, which covered fraud and fraudulent misrepresentation with intent to deceive. This was the only issue submitted by either party. It simply instructed the jury to find for the defendant if the plaintiff had the condition retinitis pigmentosa at the time of the application, explaining to the jury (R. 250), "under the law no fraud or dishonesty is involved one way or another." The Court of Appeals should have reversed with directions.

CONCLUSION.

In conclusion, it is obvious that an injustice has been done to petitioner, which would not have been done had his case been tried in the state court. If the result in question stands, the purpose of this Court in the Erie decision will have been thwarted. There can be no uniformity if the federal courts do not follow the state law as announced by the courts and as accepted by the bench and bar of that state.

For the reasons set out above, we earnestly urge this Honorable Court to grant the application for certiorari in order that the matter may be fully presented before this Court for its determination.

Respectfully submitted,

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Office - Supreme Court, U. S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

LESTER ETTMAN,
Petitioner,

vs.

FEDERAL LIFE INSURANCE COMPANY,
Respondent.

No. 426

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

LESTER ETTMAN,
Petitioner,
vs.
FEDERAL LIFE INSURANCE COMPANY,
Respondent.
No. .....

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

No reason is apparent why the Court should grant the writ in this case. Despite petitioner's protestations to the contrary, the Court of Appeals did not decide this case against the law of Missouri as declared by the statutes or the courts of that state. The opinion of the Court of Appeals is not in conflict with any Missouri case, any federal case, nor with the weight of authority. No question of general interest or of great public importance is involved.

THE ISSUES.

Petitioner's "Statement of Matter Involved," under which heading he purports to set out the facts and also to define the issues raised by the pleadings, is, in several respects, grossly unfair, untrue, and misleading.

At page 3 of the petition (fourth line from the bottom) petitioner says, "in the defense of the instant suit, the Company relied upon 'a theory of fraud and misrepresentation made with intent to deceive.' "

Where the purported quotation might be found is not indicated. While it is true that the Company pleaded intentional fraud as a defense to the instant suit, it also pleaded that petitioner, plaintiff in the action, in his application for the insurance policy sued on, made false statements with reference to matters material to the acceptance of the risk and the hazard assumed by the Company, which false statements plaintiff (petitioner) certified to be true, and on which the Company relied. Fraud and false warranty are alleged conjunctively in the Company's answer to plaintiff's petition (R. pp. 10-17), the District Court so found (R. p. 288), and the Circuit Court of Appeals so declared (R. pp. 308-309).

The Circuit Court of Appeals, in its opinion, stated the issue as follows:

> "The substantial question for decision is whether, under Missouri law, a statement in an application for a policy of limited disability insurance, without death benefits, will defeat recovery upon the policy if the statement was untrue and material but made without intent to deceive, and the insured certified to the truth of the statements made in his application, and the policy provided that 'The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made with intent to deceive, shall bar all right to recovery under this policy' " (R. p. 308).

And the Court of Appeals found:

> "The defense asserted by the Company was, in substance, that the insured lost his eyesight as the result of a degenerative disease of the eyes * * * that he

had * * * when he applied for the policy * * * that in his application he answered falsely, and with intent to deceive, certain questions; that if the Company had known that the answers were false, it would not have issued the policy; that * * * the insured certified that his answers to all questions contained in the application were complete and true; and that he agreed, in both the application and the policy, that the falsity of any answer made with intent to deceive or which was material should bar recovery under the policy" (R. p. 309).

THE FACTS.

Petitioner's statement of the facts is incomplete and inaccurate. He has ignored certain material facts shown by the record and misstated other material facts.

Briefly, the facts are that on January 3, 1928, petitioner applied to the Company for a policy of insurance to provide him with benefits of $300.00 a month if he should lose the sight of both eyes through accidental injury or sickness. In his application for the policy petitioner represented that he was not suffering from "any disease of either eye" (R. p. 74); that he did not have and never had any "difficulty with eyesight or hearing" (R. p. 77); that he had not within ten years consulted or been treated by a physician for difficulty with his eyesight (R. p. 77). He agreed that the falsity of any material answer should bar his right to recover under the policy (R. p. 74), and certified that he had made the answers appearing in the application and that each answer was "full, complete and true" (R. p. 78).

The policy in suit stated that it "is issued in consideration of the statements and agreements contained in the application * * *" and that "The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made

with intent to deceive, shall bar all right to recovery under this policy" (Plaintiff's Exhibit A, R. p. 23).

In October, 1940, plaintiff filed this suit (R. p. 2), alleging that he had lost the sight of his eyes in January, 1936 (R. p. 3). The record shows that he did lose the sight of his eyes in 1936.

Plaintiff did not testify in his case in chief (R. pp. 2-58). The evidence adduced by plaintiff shows that his blindness resulted from a disease known as retinitis pigmentosa (R. p. 28), from which he had been suffering for several years (R. p. 30); that for several years prior to 1928 plaintiff had been suffering from difficulty with his eyesight, and had consulted and been examined by several eye specialists and doctors in an effort to determine the nature of his trouble (R. pp. 46-47).

The evidence adduced by defendant shows that in January, 1918 (ten years before the insurance policy was applied for) plaintiff was sent by his physician to Barnes Hospital in St. Louis, where he remained for four days (R. p. 59). When he entered the hospital he gave a history of "near-sightedness and night blindness" (R. p. 82); of inability to read writing on the blackboard at school seven years before; "difficulty in going about at night" and limitation of the fields of vision of both eyes (R. p. 83).

In June, 1917, plaintiff registered for the draft in World War I (R. pp. 84-85), and reported to his local board that he did not consider that he was then sound and well because he had "weak eyes." The examining physician of the local board found the vision of his right eye to be 3/192 and of the left eye 3/150 (R. p. 86), and the examiner for the medical advisory board found that he was "physically deficient and not physically qualified for military service by reason of partial atrophy with contracted retinal arteries, probably a case of retinitis pigmentosa" (R. p. 87). On January 7, 1918, plaintiff claimed

exemption from the draft and deferred classification as a "person totally and permanently physically or mentally unfit for military service" (R. p. 89); stating that he was not in sound health because of "bad eyesight" (R. p. 91).

One of the physicians who treated plaintiff in 1922 (six years before he applied for the insurance policy) testified that he had retinitis pigmentosa as early as 1918 (R. p. 116); that various perimeter charts, describing plaintiff's fields of vision, were made by tests in which the plaintiff took part, and that the purpose of the tests was explained to plaintiff (R. p. 132). Several of the charts are reproduced in the record (R. pp. 120-125).

In September, 1922, plaintiff called on a doctor in Chicago, Illinois, to whom he complained that he could not see well and that he suffered from night blindness (R. p. 176).

Dr. Meyer Wiener testified that he treated plaintiff for "quite a number of years" (R. p. 204); that in January, 1918, he sent him to Barnes Hospital in an effort to discover the reason for the condition of plaintiff's eyes (R. p. 201); that plaintiff "knew his vision was affected" (R. p. 202); that in April, 1922, plaintiff reported his "vision much more blurred" than two weeks before (R. p. 205); that he "worried about his condition from the time I first saw him," and "always worried about his eyes" (R. p. 205); expressed concern about the condition of his eyes, and probably knew that he might lose his eyesight (R. p. 206); that there were blind spots in plaintiff's eyes, the presence of which any intelligent person would notice (R. p. 207).

Plaintiff himself testified that as early as 1918 he noticed that he did not see as well at night as he did during the day; that he was unable to read the writing on the blackboard in school in 1911 (R. p. 217). He admitted that he told the Company's examining physician in 1928 that he had not consulted or been treated by a physician for any

disease or difficulty with his eyes for ten years prior to applying for the insurance (R. p. 220). He admitted that he had been treated by Dr. Wiener and Dr. Wolfner (R. pp. 222, 223); that he consulted Dr. Wescott in Chicago in September, 1922 (R. pp. 222, 223); that Drs. Wescott, Wolfner and Wiener all examined his eyes and took the fields of vision (R. p. 225); that he did not remember whether in January, 1918, his eyesight was good enough to enable him to distinguish a four and one-half inch letter at a greater distance than three feet (R. p. 230); that he knew he was suffering from "difficulty" with his eyesight (R. pp. 235-236).

Petitioner, in the statement of fact on which he relies in asking this Court to issue its writ of certiorari, ignores all the above evidence, and states, at about the middle of page 5 of his petition, "there was **no evidence** that assured knew that he had said disease" (emphasis by petitioner). Again, in the first paragraph of page 8 of his petition for certiorari, petitioner states that Dr. Wiener testified that "the patient would not know what is normal or abnormal. He did not tell Ettman (petitioner) of his condition (R. 206). Nor is there any evidence in the record to show that Ettman knew that he had retinitis pigmentosa."

It is because of the excerpts here quoted from the petition for certiorari that we say petitioner has misrepresented the facts to this Court, and it is because of such misrepresentations that we have made this additional statement of fact. Petitioner's statement that the holding of the Court of Appeals that the Missouri Misrepresentation Statute had no application to this case was "in spite of several Missouri cases holding to the contrary" (Petition, p. 6) is incorrect, and will be specifically noted later.

PETITIONER'S POINT I.

Petitioner argues that where an insurance company receives enough information to put it on notice (presumably that an applicant was suffering from a disease or disabling condition—though petitioner does not say), it waives additional information if it does not request same nor make a further examination, so that it is estopped to deny the insurability of the applicant (Petition and Brief, pp. 11, 20).

Petitioner made this same contention in the Court of Appeals, and that Court properly disposed of it as follows:

> "There was, as the Court ruled, no adequate basis for charging the Company with knowledge of the existence of a disease which the insured himself testified he had not discovered, although the evidence showed that he had had it for nearly twenty years. The fact that the insured wore glasses, was nearsighted and so advised the Company's examiner, was no proof that the examiner had knowledge or notice of the existence of retinitis pigmentosa" (R. p. 321).

As there was nothing to put the Company on notice, there is no need for further discussion of this point and no necessity for considering the law as declared by the cases cited in petitioner's brief.

PETITIONER'S POINT II.

As found by the Court of Appeals, the "Misrepresentation Statute" of Missouri (§5843, R. S. Mo. 1939) "is not applicable to the policy in suit" because it "is not a life policy, but is a disability policy which contains no provision for any death benefit. The application shows that no indemnity for loss of life was asked for by the insured" (R. p. 319).

It has not been held by the Supreme Court of Missouri, nor by either of the Courts of Appeals of Missouri that

the "Misrepresentation Statute" applies to insurance policies which do not provide indemnity for loss of life, nor was it so held in the Kansas case of **Elliff v. Insurance Co.**, 153 Kans. 177, 109 Pac. (2) 92, cited by petitioner.

In **Lamport v. General Accident Fire & Life Assurance Corp.**, 272 Mo. 19, 197 S. W. 95, 96, 100, relied upon by petitioner, the Supreme Court of Missouri had under consideration (l. c. 96 of 197 S. W.) "a suit upon a policy of accident insurance * * * (which) provided an indemnity * * * for loss of life," and also for certain injuries not resulting in loss of life. At l. c. 100 of 197 S. W. the Court said:

> "* * * It has been held that a policy of this character, at least with reference to those portions providing indemnity for loss of life, were policies of life insurance within the meaning of the suicide statute of this state. Logan v. Fidelity & Casualty Co., 146 Mo. 115, 47 S. W. 948. By like reasoning, such a policy, or at least so much thereof as relates to indemnity for loss of life, would likewise be a 'policy of insurance on life,' within the scope of Section 6937, Revised Statutes 1909" [§5843, R. S. Mo. 1939], which is the Missouri Misrepresentation Statute.

In **Makos v. Bankers' Accident Ins. Company** (Mo. A.), 234 S. W. 369, relied upon by petitioner, the policy under consideration "provided for the payment of $300.00 to the beneficiary of the insured 'for loss of the life of the insured'" (l. c. 369). The Court held (l. c. 370) there was no merit in the contention that the Missouri Misrepresentation Statute "does not apply to policies of this kind."

In **Boillot v. Income Guaranty Co.** (Mo. A.), 83 S. W. (2nd) 219, the policy under consideration insured against bodily injuries affected through accidental means, and provided for the payment of $5,000.00 "if such bodily injuries resulted in the loss of life" (l. c. 220). The Court

of Appeals held that the provisions of the Missouri Misrepresentation Statute "are applicable to accident policies, **such as is here in suit**, as well as to ordinary life policies" (l. c. 223).

The three Missouri cases cited above are the only Missouri cases relied upon by petitioner as authority for his contention that the Missouri courts have held that the "Misrepresentation Statute" applies to accident and health policies which contain no provisions for death benefits. None of those cases so declare the law. Each of those cases were considered by the Circuit Court of Appeals in its opinion (R. p. 319). And, as pointed out in the opinion, the courts of Missouri have never expanded that statute to cover insurance policies which provide no indemnity for loss of life (R. p. 320).

The only other case cited by petitioner, and admitted by him to be "not controlling here" (Petition, p. 13), is **Elliff v. Inter-State Business Men's Acc. Co.**, 153 Kas. 177, 109 Pac. (2nd) 92, l. c. 95. In the Elliff case the Supreme Court of Kansas cites **Becker v. Surety Company**, 105 Kansas 99, 181 Pac. 549, as authority for its statement that the "Misrepresentation Statute" of Kansas (G. S. 1935, 40-418) applies to health and accident policies. In the Becker case the policy under consideration provided indemnity for loss of life, and the suit was for death benefits provided by the policy. The Kansas statute is not, as stated by petitioner, "the same statute, word for word" as the Missouri statute, although it is similar. Both statutes provide: "No misrepresentation(s) made in obtaining or securing a policy of insurance on the life or lives of any person * * * shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable." In Becker v. Surety Co., the Supreme Court of Kansas pointed out

that "In express terms the policy provided for 'indemnity for loss of life' by accidental means, and the fact that it also provided indemnity for accidental injuries not resulting in death does not take it out of the purview of the act" (l. c. 550 of 181 Pac.).

Thus, it is seen that in each of the cases relied upon by petitioner the policies under consideration by the state courts of Missouri and of Kansas differ from the policy in the instant case because, in each of those cases, the policy provided indemnity for loss of life, and in the instant case no such indemnity was provided. A thorough search has failed to reveal **any** case in which **any** Missouri court has ever held that the Missouri Misrepresentation Statute (§5843, R. S. Mo. 1939) applies to health and accident policies which do not provide indemnity for loss of life, and as the diligence of petitioner's counsel has not revealed any such case, we confidently assert there are none.

Therefore, it appears that the Court of Appeals, whose opinion this Court is asked to review and reverse, has not misapplied the Missouri law, and has not decided the instant case contrary to any decision of any court of Missouri. And the decision of the Court of Appeals does not violate the rulings of this Court cited under petitioner's point II, which, so far as here pertinent, hold no more than that the federal courts must follow the law as declared by the state courts.

The federal courts cannot, of course, follow the ruling of a state court when the state court has made no ruling.

PETITIONER'S POINT III.

Petitioner mistakenly interprets the law of Missouri to be that without a showing of intentional fraud and deception in the procurement of an insurance policy, payment under the policy may not be avoided regardless of whether relief is sought on the ground of fraud or warranty. In

seeking to support his contention petitioner cites **Glaser v. Pacific Mutual Life Ins. Co.**, 245 Mo. 377, 150 S. W. 549. At local citation 551 of 150 S. W. the Court, in the Glaser case said:

> "In cases not included within the provisions of said Section 6037, R. S. Mo. 1909 (The Missouri Misrepresentation Statute, now Section 5843, R. S. Mo. 1939) **a well-recognized distinction exists between a representation and a warranty in a contract of insurance.** A representation is not a part of the contract, 'but only an inducement to make it,' and will not invalidate the insurance unless false in a matter material to the risk. **A warranty is a part of the contract, and must be strictly true, whether material to the risk or not.** * * * 'It is, however, well settled that **a breach of warranty is fatal to the policy, though the insured had no knowledge of the falsity** constituting the breach, and did not intend to deceive the insurer.' "

Plaintiff also cites **Schuerman v. Ins. Co.**, 165 Mo. 641, 65 S. W. 723; **Kern v. Legion of Honor**, 167 Mo. 471, 67 S. W. 252; **Keller v. Insurance Co.**, 198 Mo. 440, 95 S. W. 903.

In each of these cases there was a policy of life insurance, and, in each case, the suit was for death benefits. The Missouri Misrepresentation Statute applied in each case, and furnished the basis of the discussion by the courts of which petitioner here seeks to take advantage. It has already been seen that the Missouri Misrepresentation Statute does not apply to the policy in this suit because "the policy in suit is not a life policy, but is a disability policy which contains no provision for any death benefit" (R. p. 319).

Furthermore, neither the Schuerman case, the Kern case, nor the Keller case hold, as contended by petitioner, that a showing of "fraud" or "bad faith" is essential where there is a warranty. Instead, those cases, and all

the Missouri cases, hold that even where the Misrepresentation Statute is involved:

> "The statute draws no distinction between innocent and fraudulent misrepresentations and the courts have no right to draw any such distinction."
>
> **Kern v. Legion of Honor**, 167 Mo. 471, 67 S. W. 252, 257.

Jacobs v. Omaha Life Association, 146 Mo. 523, 48 S. W. 462 (erroneously cited in petitioner's brief as "48 S. W. 472"), was also an action upon a policy of life insurance, and therefore constitutes no authority in this case. The Supreme Court of Missouri in the Jacobs case held that a life insurance policy was subject to the Misrepresentation Statute; that the matter misrepresented did not contribute to the death of insured; and that the misrepresentation was therefore immaterial, and that under the statute, the defense of misrepresentation was not available to the insurance company.

Jenkins v. Covenant Mutual Life Ins. Co., 171 Mo. 375, 71 S. W. 688, was, likewise, a suit for death benefits payable according to the terms of a life insurance policy, wherein the insurance company sought to avoid payment by reason "of false representations and warranties as to the then or previous condition of his health" (l. c. 689 of 71 S. W.). The jury were instructed by the trial court that if they found that assured had made untrue statements in a health certificate given by him for the purpose of reinstatement of the policy, and if they further found that the untrue statements "did not relate to matters which contributed to assured's death, then their verdict should be for the plaintiff." The Court held that, since the case fell within the purview of the Missouri Misrepresentation Statute a misrepresentation as to an immaterial matter which did not contribute to the death of assured would not bar the beneficiary's right to recover under the policy, and

that the Misrepresentation Statute applied whether or not the false statement was warranted to be true. But, as pointed out, that was a suit on a policy of life insurance. And, as heretofore pointed out, the policy with which the Court is here concerned is not a life policy, but is a disability policy which contained no provision for any death benefit.

Next, petitioner claims that the opinion of the Court of Appeals in this case is in conflict with the Third Circuit case of **Ward v. Standard Insurance Co.**, 30 Fed. (2d) 328, wherein petitioner says, "The Court of Appeals for the Third Circuit limited the defense to false representations and held there was no warranty" (Petition, p. 14). There was no question of warranty in the Ward case and the Third Circuit did not hold as contended by petitioner.

Petitioner says that the Ward case and **Kettenbach v. Omaha Life Assn.** (Neb.), 69 N. W. 135, "are cited to show that the opinion (of the Eighth Circuit Court of Appeals) is contrary to the better reasoned cases from other jurisdictions and therefore against the weight of authority. We could cite many other cases" (Petitioner's Brief, p. 25).

In reply, we say that the Kettenbach case is the only case cited by petitioner which deals with a situation that is in anywise similar, and, furthermore, it was—as were all the other cases cited by petitioner—a suit upon a life insurance policy, and not upon a policy which provided for the payment of disability benefits alone.

This Court has held in the following cases which went up from Missouri that:

> "answers are warranties, if so declared by the terms of the policy; and if any of them, however immaterial to the risk, is shown to be untrue, the policy is void."
>
> **Piedmont & Arlington Life Ins. Co. v. Ewing**, 89 U. S. 47, 22 Wall. 47, 22 L. Ed. 833;
>
> **Jeffries v. Economical Mutual Life Ins. Co.**, 92 U. S. 377, 23 L. Ed. 610.

PETITIONER'S POINT IV.

Petitioner's contention that the Company's sole defense was that the policy was procured through intentional fraud, and that it therefore waived all other defenses, has already been argued. Furthermore, as declared in the opinion of the Circuit Court of Appeals:

> "The power of this Court to deal with a plain error of law not raised or argued can not be doubted" (R. p. 319).

It was so held by the Supreme Court in the following cases:

Brasfield v. United States, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345;

New York Central R. R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706;

Wiborg v. United States, 163 U. S. 632, 658, 16 S. Ct. 1127, 1197, 41 L. Ed. 289;

Fairmount Gas Works v. Cub Fork Coal Co., 287 U. S. 474, 480, 53 S. Ct. 252, 77 L. Ed. 439;

Helvering v. Hormel (C. C. A. 8), 111 F. (2d) 1, affirmed 312 U. S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037;

Trapp v. Metropolitan Life Ins. Co. (C. C. A. 8), 70 Fed. (2d) 976, 981, certiorari denied 293 U. S. 596, 55 S. Ct. 112, 79 L. Ed. 690.

And if, as petitioner claims, this is a case in which the public interest is involved, that fact alone should furnish sufficient reason for the Court of Appeals to notice the "plain error of law" in order to prevent a manifest miscarriage of justice, and an equally sufficient reason for this Court to deny the petition for certiorari in order that justice may not miscarry.

PETITIONER'S POINT V.

Petitioner's argument that a "case must be decided on appeal on the same theory on which it was tried," fails to take into account the power and duty of the Court of Appeals "to deal with a plain error of law not raised or argued."

Petitioner's reasoning that in dealing with such error of law, the Court of Appeals disregarded the policy of the State of Missouri, is specious, and unsupported by any citation of authority.

Petitioner's contention that the opinion of the Court of Appeals contravenes the recent decisions of this Court because it fails to follow the law of Missouri, is not borne out by any case cited in his petition or brief. Nor is his argument supported by any authority, either Federal or State.

PETITIONER'S POINT VI.

In answer to petitioner's claim that he was entitled to a directed verdict, we say that the whole record warranted the conclusion of the Court of Appeals that "the verdict of the jury was justified by the evidence and the law" (R. p. 321).

CONCLUSION.

In the light of the record in this case, we submit that no injustice has been done to petitioner; that a consideration of all the evidence must lead to the inevitable conclusion that the Company, not the petitioner, was entitled to a directed verdict, as it contended in the District Court and in the Circuit Court of Appeals, which question the Court

of Appeals said it need not decide because of its affirmance of the judgment for the reasons stated in its opinion (R. p. 321).

We submit that petitioner's application for certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

LESTER ETTMAN,
Petitioner,
vs.
FEDERAL LIFE INSURANCE COMPANY,
Respondent.
No. 426.

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI.

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REPLY TO RESPONDENT'S STATEMENT.

Respondent starts its answering brief by stating that no reason is apparent why the Court should grant a writ of certiorari in this case, and the respondent tries to negative, in general terms, the contentions of petitioner.

Then respondent states that the "Statement" of petitioner is in several respects grossly unfair, untrue and misleading. This last assertion is disproved by the respondent's own quotation from the opinion of the Court of Ap-

peals (p. 2, Resp. Br.), wherein the Court of Appeals bases its opinion on the proposition that the statement in the application for insurance was untrue and material, but made without intent to deceive.

In addition, the trial court in its memorandum opinion (R. 285) expressly found that:

> "The jury was instructed upon the theory that the statements were warranties, and that if it be found that they were false it was of no moment whether plaintiff knew or did not know at the time that they were false. The verdict was for the defendant. Hence, if the Court's construction of the provisions of the policy was incorrect in this particular a new trial must follow **as there was substantial evidence that plaintiff did not know the statements were false, if in fact they were.**" (Emphasis ours.)

Respondent then states that petitioner has misrepresented the facts to this highest court because he did not set out the fact that he had poor eyesight and had visited oculists in the "Statement of Matter Involved."

Respondent also complains (p. 2, Resp. Br.) that the quotation "in defense of the instant suit, the company relied upon a theory of fraud and misrepresentation made with intent to deceive" has no page reference. It would seem that the quotation from the petition for certiorari in this court in the equity suit in 1941 should sufficiently apprise respondent of the fact therein set out (Petition, p. 4).

Respondent, complaining of the statements of petitioner, purports to quote the testimony of Dr. Meyer Wiener, a nationally known ophthalmologist. Respondent omits qualifying language that completely changes the testimony of Dr. Wiener. For instance, respondent quotes from Dr. Wiener as testifying (Resp. Br., p. 5) that plaintiff "knew

his vision was affected" (R. p. 202). The question and answer follow:

> "Q. Mr. Ettman in this case he knew that? A. I don't know that. He never told me that. He knew his vision was affected, but I don't know whether he knew how it was affected."

Then respondent quotes (Resp. Br. 5) "and probably knew that he might lose his eyesight" (R. p. 206). The actual testimony is as follows (R. 206):

> "Q. Did he show concern and fear that he was going to lose his eyesight? A. I don't know. I could not tell you that. I don't know.
>
> Q. You don't know? A. No, sir, but I know that he would eventually lose his eyesight, but I doubt very much whether he knew it unless somebody else told him.
>
> * * * A. I don't know that he knew anything or had any way to find out the seriousness of his condition, unless some other doctor told him, because I didn't tell him.
>
> Q. Do you recall whether he expressed fear that he might lose his eyesight? A. He probably knew, but I don't recall. If he did we probably reassured him. I could not tell you that.
>
> * * * A. I don't recall his ever expressing it. I don't see that these are contradictory. I still maintain that I doubt very much whether he knew that he realized the seriousness of his condition."

Dr. Wiener further testified (R. 201) that while Ettman's mother knew what his condition was, the doctor did not tell him the truth of his condition, because his mother had requested the doctor not to.

Dr. Alvis, partner of Dr. Meyer Wiener, testified (R. 119):

> "Q. Dr. Alvis, on each of the occasions that Lester Ettman came to your office on the dates you have men-

tioned, was he there for observation and treatment. A. He was; mainly for observation.

Q. And for such treatment as you could give him? A. That is right.

Q. Why would you say it was mainly for observation? A. Because treatment is not indicated in this condition, that is, local eye treatment."

Dr. Alvis testified that he never, to his knowledge, told Ettman of his condition, that his record did not show that he ever told him (R. 136), the record fails to show that any doctor ever told petitioner, and yet respondent has the audacity to speak of misrepresenting to this Court!

Ettman did not visit any oculist between December 10, 1923, and January, 1928 (R. 138, also 241). He did not visit an oculist over fifteen times in twenty-five years (R. p. 242).

The company examined Ettman. It relied upon its examiner's report, not upon any alleged statements made by Ettman. As a matter of fact, Ettman could not have answered "no" under question 4, "Difficult with eyesight or hearing," because the examiner in his medical report wrote to the company that Ettman had moderate myopia, and noted same on his own records, and also wrote "yes" after "ear, eye, etc.," as we have shown in the petition (p. 8) (R. 152). Therefore, there could have been no misrepresentation or misstatement, and the application provides that no statement made by the applicant not included in the application should void the policy or be used in any legal proceeding.

The Missouri Supreme Court has held that a defense cannot be based upon false representations concerning consultations with physicians since the consultation does not contribute to the contingency.

Keller v. Home Life Ins. Co., 198 Mo. 440, l. c. 462, 95 S. W. 903, l. c. 909.

Respondent then argues that during the World War petitioner was examined and rejected because of his eyes. The record shows that Ettman had no access to and never saw his war records; that they were sent direct to Washington (R. 109). It was not the practice to allow draftees to see their records (R. p. 109). Dr. Taussig, in signing his certificate, set out that he was not physically qualified for military service by reason of "weak eyes" (R. 87). Such was the "Finding of the Local Board" (R. 88, 91). When Ettman, the petitioner, was approached by a representative of the company to sign an authorization to examine any of his records, he granted the same (R. 214), and there is no evidence whatsoever in the record to show that petitioner in any way defrauded the company or made any statements with intent to deceive.

The Court will find that the petitioner has not in a single instance misquoted or misstated any fact. The respondent has simply set out its conclusions and not the facts justifying such conclusions. There is no evidence to show that Ettman knew of the character of the eye defect from which he was suffering until he learned about it in 1937, which was about a year after he became blind and nine years after he took out the policy.

Dr. Salter (R. 161) testified that the word "no" that he wrote in the application was an inadvertence. It was so interpreted by Judge Collet in his opinion (R. 292). Besides, Dr. Salter, in the medical examiner's report to the company (R. 79), stated that the only impairment of sight or hearing was "only moderate myopia." He further stated that he was not mailing a confidential report to the company, although the medical examiner's report provides one must be sent in each case (R. 80), and certified that he had carefully examined Ettman in private (R. 80).

Dr. John Green, testifying for the company, testified that if a patient came to him and told him that he had moderate

myopia, he would examine him (R. 107). Myopia would immediately indicate to his mind the possibility of changes taking place later (R. 113). In other words, this would place him upon sufficient notice that there existed an eye defect calling for further examination.

There is no evidence that any doctor told him that he had retinitis pigmentosa or that he would lose his sight, and therefore we repeat there is no evidence in the record that assured knew that he had the disease or that he would lose his eyesight. **There is a big difference between knowing that the eyesight is affected or defective and knowing that one is going to lose his eyesight.** The burden to prove such knowledge was on the company, which knew that one of the specific risks it assumed under the policy was the loss of sight.

The above statement with reference to the correct way that the testimony is set out in the record shows the inaccurate, misleading and reckless statements of the respondent.

As a matter of fact, this Court's decision must necessarily be based upon the statement in the opinion of the Court of Appeals which is set out both in the application for certiorari and in the answering brief of the respondent. The Court of Appeals expressly based its opinion upon the basis of a statement "untrue and material but made without intent to deceive" (R. 308).

REPLY TO RESPONDENT'S POINT I.

Replying briefly to the argument of respondent to petitioner's point I, wherein the respondent contends that, "As there was nothing to put the company on notice, there is no need for further discussion of this point and no necessity for considering the law as declared by the cases cited in petitioner's brief." It is obvious that respondent has missed the point. The Missouri rule is not, as declared in

the opinion of the Court of Appeals (R. 321), to the effect that the fact that the assured wore glasses, was near-sighted and so advised the company's examiner "was no proof that the examiner had knowledge or notice of the existence of retinitis pigmentosa." Under the Missouri law, if the company has sufficient knowledge or information **which, if pursued with reasonable diligence, would have led to the discovery of the condition, this is sufficient.** Otherwise a company could shut its eyes and then say that it had no notice or knowledge of the condition. In the case at bar certainly the company, through its medical examiner, after removing Ettman's glasses and examining his eyes with a light (R. 211), noticing that he wore thick, heavy glasses and having indicated that there was a condition there when the medical examiner put the word "yes" after the question "Eyes, ears, etc.," in the examiner's record (R. 162), was put on inquiry, and, if the company had pursued the matter with reasonable diligence, it would have led to the discovery of the condition which was not known to petitioner. (See cases cited under Point I, Petition for Certiorari, p. 20.) **It is not necessary that an insurance company have actual notice or knowledge under the Missouri law.**

REPLY TO RESPONDENT'S POINT II.

It is next contended by respondent that the Missouri decisions construing the Missouri Misrepresentation Statute do not apply to health and accident policies unless there is a provision for indemnity for loss of life. Respondent also states that the holding in the case of Elliff v. Insurance Co., 153 Kans. 177, 109 Pac. (2) 92, cited by petitioner, does not so hold. The respondent's argument that the Elliff case does not so hold is based upon the fact that the Elliff case cites Becker v. Surety Company, 105 Kans. 99, 181 Pac. 549, for the authority of the Supreme

Court of Kansas that the Misrepresentation Statute applies to health and accident policies. Respondent argues that because there was a death provision in the Becker case that the Elliff case must be based upon that fact. The Elliff case is independent of the Becker case and the Elliff case involved a health and accident policy. The fact that it cites the Becker case proves that the Kansas Court holds that it makes no difference whether there is also a death provision or not. The same rule prevails in Missouri.

Having no answer to the Elliff case, the respondent undertakes to analyze the Becker case, which is cited in the Elliff case, and by a species of legerdemain undertakes to show that the Court in the Elliff case, which was a health and accident policy, must, nevertheless, have had a death benefit in mind because the Becker case had one. We say that it is immaterial whether there is a death provision or not. It is a question of the policy of a state; it is a question of what the Legislature intended to protect against. Is there any reason why the Legislatures of the States of Missouri and Kansas should discriminate against the holders of health and accident policies merely because there is no death provision in them? If they had intended to do so, would they not have said so?

In the interest of brevity, we do not again quote the Misrepresentation Statutes of Missouri and Kansas. They are exactly the same, word for word, except that Missouri has added at the end "and whether it so contributed in any case shall be a question for the jury." We have heretofore pointed out the policy of Missouri and the policy of Kansas is to apply the Misrepresentation Statute to all policies of insurance, whether life, health or accident is involved, as opposed to property insurance. Under the decisions of this Court, where there is a pronouncement of the state law, which ruling has not been disproved, and there is no evidence that the law of the state is otherwise,

it is the duty of the federal court to follow the state rule. [Cases cited under (2) Reasons for Granting the Writ.]

Has the Court of Appeals a right to say that the trial judge and counsel representing both sides are all wrong in following the state policy through the pronouncements of its courts and the general acceptance by the Bar, and that it will declare the law of the state otherwise and contrary to the pronounced policy of the state?

REPLY TO RESPONDENT'S POINT III.

Under point III respondent construes the Misrepresentation Statute to apply to innocent as well as fraudulent misrepresentations; that the statute applies in either event. This was the position taken by the respondent below. The first suggestion of any warranty came from the trial judge (R. 250). The respondent for the first time adopted the notion of a warranty as a defense when petitioner filed a motion for a new trial. The first time that anybody questioned the applicability of the Misrepresentation Statute was in the opinion of the Court of Appeals.

We have already shown that the Misrepresentation Statute applies to warranties as well as misrepresentations. Kern v. Legion of Honor, 167 Mo. 471, 67 S. W. 252.

REPLY TO RESPONDENT'S POINT IV.

There is a difference between dealing with a plain error of law not raised or argued and a theory upon which a case was tried below. The situation in the case at bar is not a case where there is plain error of law not raised or argued. The court below and the parties believed and assumed that the Misrepresentation Statute applied. The case was tried on that theory. The decisions cited by respondent (Resp. Br. 14) are without application. For example:

Hormel v. Helvering, 312 U. S. 552-560, involved questions of law neither present nor passed upon.

In N. Y. Central R. Co. v. Johnson, 279 U. S. 706, there was no exception saved to prejudicial remarks of counsel.

In Brasfield v. U. S., 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345, the Court held it to be reversible error for the trial judge to inquire how a jury stands. Failure to except below did not preclude the Supreme Court from so holding.

In Fairmont Glass Works v. Coal Co., 287 U. S. 474, 480, 53 S. Ct. 252, 77 L. Ed. 439, the Court held that the Court of Appeals could under its rules hold that the trial court erred in refusing to grant a new trial, although not assigned as error, since the motion for a new trial was directed to the failure to award substantial damages. This Court found that every Circuit Court of Appeals except the Eighth has a rule authorizing it to notice a plain error not assigned.

We do not believe such a rule applies to the present situation. The parties tried the case on theory that the Misrepresentation Statute applied. It does apply. The Court of Appeals is the first court to hold that it does not apply. Its opinion contravenes the pronounced policy of Missouri and the applicable decisions construing the statute.

Such cases cannot control the failure of a federal court to apply the recognized substantive law of the state courts.

REPLY TO RESPONDENT'S POINT V.

The same is true of respondent's answer to petitioner's point V. It was not a case of dealing "with a plain error of law not raised or argued." It is a case of failing to follow a substantive rule of state law.

REPLY TO RESPONDENT'S POINT VI.

It is then contended that the Court of Appeals held that "the verdict of the jury was justified by the evidence and the law." What law? The law as declared by the Court of Appeals that there was a warranty, that the Misrepresentation Statute did not apply? If we are correct in our contention that the Court of Appeals is in error in so declaring the law, then the statement would undoubtedly be withdrawn by the Court of Appeals. We say that under the Missouri law, governing the issues of waiver, both in connection with the medical examination; and in connection with the pleadings and legal position taken by the company both in the equity suit and in its answer in the instant suit, under the Misrepresentation Statute, the company presented no defense, was estopped to deny the insurability of petitioner, and there should have been a directed verdict for the plaintiff.

We respectfully pray the Court to grant the petition for writ of certiorari for the reasons therein and herein set out.

Respectfully submitted,

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(4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 426.

LESTER ETTMAN, *Petitioner,*

v.

FEDERAL LIFE INSURANCE COMPANY, *Respondent.*

PETITION (1) FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI OR (2) IN THE ALTERNATIVE FOR AN ORDER OF REMAND.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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FOREWORD.

Counsel believe that the court's decision in *Meredith* v. *Winter Haven*,[1] decided the same day that certiorari was denied herein, places the present case in an entirely different light from that presented in the original petition for certiorari.

In brief, we believe the decision below is based on a conception of the scope of a federal court's duty in the construction of state statutes basically at variance with the principle, if not the direct holding, of the *Meredith* case. The conflict in philosophy is so basic, and raises problems in judicial administration of such general importance, that we feel warranted in praying that the court either (a) remand the case to the Court of Appeals for reconsideration in the light of the principle underlying the *Meredith* case, or

[1] No. 42, 1943 Term; 88 L. ed. (Adv.) 1.

(b) consider this motion as though it were an original petition for certiorari, affording counsel for respondent, if that is deemed proper, the same opportunity of filing a reply brief as in the case of an original petition.

NEW QUESTIONS PRESENTED.

1. Whether a federal court, under *Meredith* v. *Winter Haven,* can refuse to apply a state statute beyond its literal wording, solely on the ground that the statute *has not yet been* "expanded" by "compelling authority" of prior state court decisions.

2. Whether it is not the duty of a federal court, in such case, to affirmatively decide whether the literal wording of the statute *ought* to be "expanded", giving due consideration to:

(a) The legislative history of the statute, its dominating general purpose, and the trend of prior state court decisions;

(b) The reasonableness, in terms of all these considerations, of either "expanding" or not "expanding" the statute; and

(c) In general, whatever other factors would be appropriate were the decision being made by a state court itself.

3. If there is such affirmative duty, whether a Circuit Court of Appeals should reverse an interpretation of a state statute assumed by the District Court and not questioned in the briefs or argument before it, without first asking for reargument on this issue.

4. Whether, as a matter of judicial administration, a Circuit Court of Appeals, in such situation, should not remand the case to the District Court, more familiar with the state decisions and their prevailing interpretation by the state courts and bar, rather than consider the statute on the basis solely of its own reading of some of the reported decisions.

STATEMENT.

The statute in question is the Missouri Misrepresentation Statute which bars certain defenses with respect to policies of "insurance on the life or lives of any person or persons." The policy in suit was a health and accident policy under which insured had not applied for indemnity for death. The District Court (the Judge before whom the case was tried had previously been a Justice of the Missouri Supreme Court) and both parties assumed that this statute did apply to petitioner's policy.

The opinion of the Court of Appeals, holding that the federal courts could not apply the statute to the policy, did not consider the legislative history of the statute, or its dominating general purpose, or any other of the elements appropriate in the interpretation of statutes. It pointed to no decisions holding or indicating that the Missouri courts would *not* apply the statute to a policy such as the plaintiff's. To the contrary, it conceded that, in the light of prior decisions of the Missouri courts, it was "possible that the courts of Missouri may, by construction, *expand* this statute to cover every kind of policy written by a company authorized to write insurance on life." It concluded, however, that since the Missouri courts "as yet * * * have not" *expanded* the statute, the court "in the absence of compelling authority * * * will not rule, intimate or agree that the statute applies to the policy in suit."

NEW SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred (in addition to the errors pointed out in the original petition for certiorari):

1. In rejecting the view of the District Court and of both parties that the Misrepresentation Statute did apply to petitioner's policy, solely on the ground (dubious under the cases cited *infra* pp. 9-11) that the Missouri courts *had not yet* "expanded" the statute "by construction" to expressly cover the case at bar.

2. In not itself considering and deciding the applicability of the statute in the light of:

(a) The legislative history of the statute, its "dominating general purpose," and the trend of prior state court decisions;

(b) The reasonableness, in terms of all these considerations, of either "*expanding*" or not "*expanding*" the statute; and

(c) In general, whatever other factors would be appropriate were the decision being made by a state court itself.

3. In not remanding the case to the District Court to decide the applicability of the statute not merely on the basis of the few reported cases but also in the light of the interpretation, if any, commonly accepted by the Missouri bench and bar, or, if this was not error, then,

4. In not affording counsel the opportunity, on reargument, to thoroughly brief and argue the applicability of the statute which had not previously been questioned in the case. (As pointed out pp. 10-12 herein, the Circuit Court's necessarily limited research overlooked two Missouri cases which counsel have since found which squarely support the District Court's view.)

DISCUSSION.

1. *Are state statutes to be treated by the federal courts as law "per se" or "sources of law"?*

The decision below involved a fallacy in legal thinking which, unless corrected at the start, can play havoc with the objectives of *Erie R. Co.* v. *Tompkins*,[2] and *Meredith* v. *Winter Haven.*

The theory of the court below was apparently this: That statutes are not starting points for judicial law making, but an intrusion on the common law effective, per se, only

[2] 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817.

within the confines of their precise wording; that when state courts apply a statute beyond its precise wording they are "expanding" what was previously inapplicable; that, hence, the "law" of a state to be applied by the federal courts cannot include a situation beyond the literal wording of the statute until the statute has already been "expanded" by the state courts.

This theory of the trial court, we submit, involves a fallacy that derives from the same attitude, "hostile to the legislative process itself", repudiated in the *Joyner Leasing Corporation*[3] and *Dotterweich*[4] decisions of November 22nd. These cases, of course, involved the construction of a federal statute and not the interpretation by federal courts of ambiguous state enactments. We submit, however, that the fundamental concept underlying these cases, *with respect to the nature of the judicial process, in connection with the interpretation of statutes,* is inconsistent with the limited conception of the court below as to the scope of its power to interpret state enactments.

2. *Is there a duty to construe?*

The correct view, we submit, is that state enactments are never *law per se* but in reality, merely only one of the *sources of law* that make up the total jurisprudence of a state;[5] that, when state courts apply a statute beyond its literal wording, they are not "expanding" a rule that did not previously apply but are merely clarifying what was previously in doubt; that, therefore, under the *Erie* case, and particularly since the *Meredith* case, a federal court

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[3] No. 24, 1943 Term.

[4] No. 5, 1943 Term.

[5] This point needs no elaboration beyond reference to *Gray*, The Nature and Sources of Law, 2nd Ed., 1924, p. 170 et seq.; Landis, *Statutes and the Sources of Law*, Harvard Legal Essays (1934) 213, et seq.; Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 12-16 (1936); Stone, *Law and Its Administration* (1924) p. 25.

cannot refuse to apply a statute merely because it has not previously been "expanded", but *must assume a positive role in interpreting the statute just as though it were a state court faced with the same problem.*

If there is such a duty, more is necessary, under the *Meredith* case, than was done here by the Court below. At the very minimum, there is a duty to consider the legislative history of the statute and its *"dominating general purpose"* [6] and to recognize that a legislative enactment *"is to be treated as a working instrument of Government and not merely a collection of English words."* [7]

In this case, the legislative history of the Missouri Misrepresentation Statute (which the Court below deemed itself without authority to consider) leaves little doubt that the statute ought to be construed to cover all policies of insurance other than insurance on property. While this is not the occasion (or, we believe, the forum) to weigh this legislative history, the following summary may be appropriate as emphasizing what we believe is the proper scope of the duty to construe.

The Missouri Misrepresentation Statute was enacted in 1874.[8] At that time, the only type of insurance on persons recognized by the Missouri statutes was "assurance upon the lives of individuals".[9] It is therefore only natural that the Misrepresentation Statute was worded solely in terms of misrepresentations in obtaining "a policy of insurance on the life or lives of any person or persons". The authority of life insurance companies to issue other forms of coverage with respect to persons was not extended to

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[6] *Securities & Exch. Comm.* v. *Joyner Leasing Corp.*, 4 U. S. S. Ct. Bulletin (1943-1944) 109, at 113.

[7] *United States* v. *Dotterweich*, 4 U. S. S. Ct. Bulletin (1943-1944) 117, at 119.

[8] Laws of Missouri (1874), p. 89.

[9] Laws of Missouri (1879), "An Act for the incorporation and regulation of Life Insurance Companies", Sec. 1, reading "Any number of persons * * * may associate and form a company for the purpose of making assurance upon the lives of individuals."

include accident disability until 1889,[10] or to cover sickness disability, until 1919.[11]

From this history alone, we submit that a court could reasonably conclude (a) that the Missouri legislature of 1874, in using the words "insurance in the life or lives of any person or persons", could not conceivably have intended them as words of art in contradistinction to policies providing indemnity for accident or sickness; (b) that the evil at which the statute was directed is as serious when an accident or sickness policy is forfeited for innocent breach of warranty as when the forfeiture is made of a straight life policy; and (c) that, therefore, in the absence of subsequent legislation expressly *excluding* these new types of insurance, the statute must be construed as being applicable to them.

We do not here suggest that this is the only conceivable inference which might be drawn from the legislative history. Neither do we suggest that the federal courts can read into the jurisprudence of a state a policy of liberal statutory interpretation where the state courts themselves have adopted one "hostile to the legislative process itself". Conversely, however, where, as is true here, the state courts have been consistently liberal, and *concededly might* apply the statute to a situation not within its literal terms, it is the duty of the federal court to consider the legislative history and dominating general purpose of the legislation, if not as sympathetically as the *Joyner* and *Dotterweich* cases require with respect to federal legislation, then at least as sympathetically as did the court in *Heydon's Case*[12] almost five centuries ago.

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[10] Missouri Rev. Statutes (1889), Sec. 5811.

[11] Laws of Missouri (1919), pp. 391, 392.

[12] 3 Co. 7 (1584): "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered: 1st. What was the Common Law before the making of the Act. 2nd. What was the mischief and defect for which the Common Law did not provide. 3rd. What remedy the Parliament

3. *Is there a duty to inquire?*

We submit that a federal court, particularly a court of appeals, should not, within the doctrine of the *Meredith* case, assume the weighty responsibility of overruling a District Court on a dubious question of statutory construction, not discussed in the briefs on appeal, without at least opening the case for reargument (assuming that it ought not go further and remand the case to the District Court).

In this particular case the applicability of the Misrepresentation Statute *had never been questioned until the Court of Appeals handed down its final opinion.* Counsel had no opportunity to brief or argue the issues before the court. Counsel's only opportunity was on motion for rehearing; and the issues previously in the case were by themselves so complicated that counsel cannot be regarded, we submit, as having had, merely in the time allowed for his motion for rehearing, a proper opportunity to brief and present the admittedly complicated problem of statutory construction which was involved.

That this is no fanciful argument is borne out by what actually has occurred in this very case. *Counsel have in the past few days found two Missouri decisions*[13] *which the Circuit Court of Appeals did not cite in its opinion, and apparently overlooked, which squarely support the interpretation of the statute followed by the District Court.*

Normally the failure of counsel to discover all applicable decisions is a risk that any litigant is bound to assume; and we are not attempting to excuse the omission of these

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resolved and appointed to cure the disease of the Commonwealth. And 4th. The true reason of the remedy; and then the office of the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico." (As quoted by *Gray, The Nature and Sources of the Law* (2nd Ed. 1924) p. 178)

[13] See infra p. 10.

cases in our original petitions. Our whole point, rather, is to emphasize the essential impropriety of a Circuit Court of Appeals injecting a new and difficult question of state statutory construction into a case without at least affording counsel an opportunity to fully brief and argue the point.

4. *Is there a duty to remand?*

Enough has been said, we believe, to demonstrate the error of the Court of Appeals in reversing the District Court without assuming the affirmative duty to construe, considering the legislative history of the statute, its dominating general purpose, and other factors appropriate were a state court faced with the same case.

We submit, however, that the proper procedure, in a case like this, is for the Circuit Court of Appeals to remand the case so that the District Court, rather than the Court of Appeals, can discharge the responsibility of construing the local statute.

As this Court said in *West* v. *Telephone Company*[14] "there are many rules of decision commonly accepted and acted upon by the bar and inferior courts, which are nevertheless laws of the states, although the highest court of the state has never passed upon them". If this be true, it would seem that the *initial* interpretation of an ambiguous state statute should be made by the District Court which, in fact as well as in theory, is usually in closer rapport with the rules of decision commonly accepted and acted upon within the state, than the Circuit Courts of Appeal can possibly be.

On this point, we hope it is not entirely irrelevant to point out that the District Judge, with whose interpretation of the statute the Circuit Court of Appeals disagreed, was, before his appointment to the federal bench, a member of the Supreme Court of Missouri; or to point out that, with

[14] 311 U. S. 223, 236; 85 L. ed. 139; 61 S. Ct. 179.

very few exceptions, our district judges are appointed from among the local bench and bar of the state in which they preside.

Errors Urged in Original Petition.

In emphasizing the additional errors discussed above, counsel should not be deemed as minimizing the importance of the errors discussed in the original petition for certiorari. As to these, the following comments are submitted, in addition to those included in petitioner's original petition.

1. *Applicability of Misrepresentation Statute.*

If we are in error in arguing that there was an affirmative duty to construe beyond the decided cases, then the decision below constituted plain error under the *Erie* case in view of the two reported Missouri decisions which petitioner has found since the denial of his original petition for certiorari, already referred to above (p. 8).

These cases are *Lilly* v. *Washington Fidelity National Insurance Co.*[15] and *Fraker* v. *Commonwealth Casualty Co.*[16]

These two decisions, we submit, indicate clearly that the Missouri courts have in fact applied the Misrepresentation Statute to accident and health policies, *even where those policies do not provide death benefits,* and hold that the issue of misrepresentation in the case of such policies, as well as in the case of life policies, is one for the jury, and the harsh doctrine of warranty invoked by the Court of Appeals is not applicable.

In the *Lilly* case, *supra,* the Kansas City Court of Appeals, in a suit on an "accident and health policy" *which did not include death benefit provisions,* held that the Misrepresentation Statute in question was applicable and held that the trial court properly refused to give an instruction that if plaintiff wrongfully and intentionally withheld and

[15] 44 S. W. (2d) 656 (Mo. App., 1931).
[16] 278 S. W. 1053 (Mo. App., 1926).

concealed from defendant facts material to the assumption of risk and the acceptance of hazard in his answers to the questions asked in the application, it should find for the defendant, even though such misrepresentations did not directly contribute to the illness and consequent loss of time. The court held (I. c. 658) that, "This instruction is in the very teeth of the Misrepresentation Statute," quoting the statute. Furthermore, the Court held that the instruction was properly refused because there was no deposit in Court of the premiums, as required by the second section of that statute, now Section 5846 R. S. Mo. 1939, which also refers to "life policies", clearly showing, we submit, that the Missouri Courts do in fact construe the statute to include accident and health policies without death benefits.

The *Fraker* case, *supra,* was also a suit on an accident and health policy without death benefits. The plaintiff admitted that he had a venereal disease at the time of the application for insurance, but invoked the provision of the Misrepresentation Statute. The Kansas City Court of Appeals again held that the defense of misrepresentation was not available, because of the Misrepresentation Statute.

We have already shown in our original petition for certiorari that Kansas, which has the same Misrepresentation Statute, also held it applies to accident and health policies. (Elliff v. Assn. Co. 153 Kans. 177, 109 Pac. (2d) 92, l. c. 95.) So far as we know, Missouri and Kansas are the only two states in the United States which have a practically identical Misrepresentation Statute, the sole difference being that the Missouri statute not only limits the type of defenses which can be raised but also requires a jury trial on those which are still permitted.

In the light of the two cases cited above, as well as the trend of legal thinking evidenced by the cases in our original briefs (and even without looking at the statute's legislative history or general purpose), we believe that the Court of Appeals was clearly in error in holding that the statute

did not apply to plaintiff's policy, merely because of the fortuitous circumstance that his application for insurance did not request any payments in the event of death through accident.

2. *The rule of waiver and the right to a jury trial thereon is one of substantive law.* Pretz vs. Ins. Co., 71 S. W. (2d) 826, l. c. 831; Nevil vs. Wahl, 65 S. W. (2d) 123, 228 Mo. App. 49.

On December 14, 1942, this Court held (Garrett vs. Moore-McCormack Co.[17]) that whether a state court in trying a case in which rights asserted are granted by federal law, proceeded in such a manner that all the substantial rights of the parties under controlling federal law were protected, raised a federal question. This Court held that the right of the petitioner, in the Garrett case, to be free from the burden of proof imposed by the Pennsylvania law inhered in the cause of action. By parity of reasoning, and under the principle announced in the Garrett case, the issue of waiver and the right to have that issue tried by jury is a part of the very substance of petitioner's claim. As said in the Garrett case, "It cannot be considered a mere incident of a form of procedure."

Under the Missouri law, where the insurer examines the applicant (R. p. 211) and receives information, which if pursued with reasonable diligence, would lead to a discovery of the situation, it waives the physical condition of the applicant and is estopped to deny his insurability. Brummer vs. Ins. Co., 59 S. W. (2d) 781, l. c. 786; Loduca v. Ins. Co., 105 S. W. (2d) 1011; State ex rel. vs. Allen, 303 Mo. 608, 262 S. W. 43.

We believe that under the Missouri law the insurance company waived any additional examination as a matter of law, but that in any event this was an issue for the jury. The trial court refused to submit the issue to the jury (R. 265-266) and the Court of Appeals affirmed and refused to consider the same.

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[17] 316 U. S. 656, 62 S. Ct. 1268.

CONCLUSION.

The issues in this case are, we believe, basic to the proper application of the *Meredith* decision in the important area of statutory construction in diversity of citizenship cases. They are issues, we believe, which must be resolved sooner or later by this court. We trust, therefore, that it is not inappropriate to suggest that, by resolving them here, the Court may also ameliorate what was admittedly[18] a harsh decision below.

Respectfully submitted,

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We certify that this petition is presented in good faith and not for delay.

J. L. London,
Counsel for Petitioner.

Monroe Oppenheimer,
Of Counsel.

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[18] The District Court, in its memorandum opinion (R. 284, 286) said: "The contract under consideration belongs to a species which fortunately is rapidly becoming extinct. The more modern practice of greater fairness to the insured and fewer limitations on the liability of the insuror is not exemplified by the provisions of the policy in suit."

END OF

A CASE